Supreme Court, U.S.
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NO. 87-1783

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

WILLIAM A. BRACKENRIDGE,

Appellant,

vs.

AMETEK, INC.
and
BARING INDUSTRIES, INC.

Appellees,

On Appeal From
The Supreme Court of Florida

AMETEK'S MOTION TO DISMISS APPEAL

DAVID C. POLLACK, ESQUIRE
RICARDO TORRES, JR., ESQUIRE
Attorneys for Appellee,
Ametek, Inc.
STROOCK & STROOCK & LAVAN
3300 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2385
(305) 358-9900

QUESTION PRESENTED

Whether a litigant's reliance on a state common law rule is a vested property right, precluding application of a change in that law to his pending cause of action.

LIST OF ALL PARTIES

The proper appellees are Ametek, Inc. ("Ametek") and Baring Industries, Inc. Appellant unnecessarily lists American Machine and Metal Co. ("American Machine") and Troy Equipment, Inc. ("Troy Equipment") as parties to this appeal.[1]

In the proceedings below before the Florida Third District Court of Appeal and the Supreme Court of Florida, American Machine and Troy Equipment were not listed as parties in the style of the case, and were not mentioned by any of the parties in their briefs or by either of the courts in their opinions. Any reference to them here is superfluous.

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1. Appellant named American Machine and Troy Equipment defendants in its Second Amended Complaint, alleging them to be Ametek's predecessors. (R. 125). In its Answer to Second Amended Complaint, Ametek indicated that American Machine was its former name and that Troy Laundry Machinery was the name of one of its former divisions. Ametek denied having any connection to Troy Equipment. (R. 256).

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STATEMENT OF THE CASE

In 1975, the Florida legislature enacted Fla. Stat. § 95.031(2), the statute of repose, providing that products liability suits had to be commenced within twelve years after delivery of the product to its original purchaser.

Ametek manufactured, and in or about September 1967 delivered to its original purchaser, a commercial laundry machine known as an extractor.[2] Appellant alleges he was injured while operating the extractor in December 1982, more than 15 years after the extractor's delivery to its original purchaser. Petitioner's suit was filed in December 1984, more than 17 years after the extractor's delivery and well beyond the statute of repose twelve year period. *See* appellant's Jurisdictional Statement at 3-4.

In 1980, the Supreme Court of Florida held in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980), that "as applied to this case, section 95.031 denies access to the courts under Article I, Section 21, Florida Constitution."[3] Appellant filed his suit against Ametek in 1984, apparently under the impression that, because of *Battilla*, his cause of action was not barred by the statute of repose.

In 1985, while appellant's suit against Ametek was pending, the Supreme Court of Florida, in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986), "receded" from *Battilla*, confirming

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2. An extractor spins wet clothes to remove excess water prior to their being placed in a dryer.

3. Article 1, Section 21, Florida Constitution, the access to courts provision, provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

that the statute of repose was, under the Florida Constitution, a permissible exercise of a legislative prerogative.

> The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product. Justice McDonald, in maintaining the constitutional validity of section 95.031(2) in his dissenting opinion in *Battilla*, correctly reasoned as follows:
>
> * * * *
>
> I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers.

476 So.2d at 659-60

Relying on *Pullum*, the trial court (R. 468), Third District Court of Appeal,[4] and Supreme Court of Florida,[5] held that appellant's cause of action against Ametek was barred by the statute of repose. All three courts rejected appellant's contention that applying *Pullum* to his pending action deprived him of a vested property right under the Florida Constitution.

As shown below, appellant did not raise any issues under the United States Constitution before the Supreme Court of Florida, and that court's holding was based solely on Florida law.

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4. *Brackenridge v. Ametek, Inc.*, 503 So.2d 363 (Fla. 3d DCA 1987).

5. *Brackenridge v. Ametek, Inc.*, 517 So.2d 667 (Fla. 1987).

REASONS WHY APPEAL SHOULD BE DISMISSED

I. BECAUSE APPELLANT DID NOT HAVE A VESTED PROPERTY RIGHT IN HIS TORT CLAIM, THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The sole basis of this appeal is appellant's contention that his cause of action against Ametek was a vested property right which could not be retroactively barred by *Pullum*. Appellant argues that such a result violates the due process clause of Article XIV, Section 1 of the United States Constitution. *See* appellant's Jurisdictional Statement at 7-8. This is not the law.

In *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 420 (1919), this Court recognized that "no person has a vested right entitling him to have . . . any . . . rules of law remain unchanged for his benefit." More recently, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, (1978), the Court noted that "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law'." 438 U.S. at 88 n.32. *See also, Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978) ("It is well settled that a plaintiff has no vested right in any tort claim for damages under state law."); *Silver v. Silver*, 280 U.S. 117, 122 (1929) ("We need not . . . elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . .").

Appellant's reliance on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), in support of his position that his cause of action is an absolute property right is misplaced. *Logan* noted that "a cause of action is a species of property . . . ." 455 U.S. at 428 (emphasis added). But *Logan* also ruled that although a cause of action may be a "species" of property, it can be abolished by a state.

> Of course, the State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs. The Court held as much in *Martinez v. California* . . . where it upheld a California statute granting officials immunity from certain types of state tort claims. We acknowledged that the grant of immunity *arguably* did deprive the plaintiffs of a protected property interest. But they were not thereby deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefit levels.

455 U.S. at 432 (emphasis added).

Moreover, *Martinez v. State of California*, 444 U.S. 277 (1980), on which *Logan* relied, undermines appellant's argument here. In *Martinez*, plaintiff's daughter was murdered by a parolee with a long history of prior violent crimes. Plaintiff sued the state officials responsible for the release of the parolee, alleging they were negligent and liable for the wrongful death of his daughter. Plaintiff's complaint was dismissed on the basis of a California statute immunizing public employees from liability arising from their decisions whether to parole criminals. Plaintiff then challenged the constitutionality of the statute, arguing that by abolishing his common law cause of action for wrongful death, the state deprived him of property without due process.

Martinez presented the Court with compelling equities. In fact, the Court observed that based on the record, it assumed that defendants "knew, or should have known that the release of Thomas created a clear and present danger that such an incident would occur." 444 U.S. at 280. Nevertheless, the Court found that although a common law cause of action may be a "species" of property, the abolition of that cause of action does not offend due process or otherwise raise a substantial federal question.

> Nor can the statute be characterized as an invalid deprivation of property. Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.

444 U.S. at 281-82.

The Court's view that the abolition of the plaintiff's cause of action did not violate due process is further illustrated by its application of the rationality test — the lowest level of constitutional scrutiny:

> We have no difficulty in accepting California's conclusion that there "is a rational relationship between the state's purposes and the statute". . . . Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that

> it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination.

444 U.S. at 282-83.

In *Pullum*, the Supreme Court of Florida determined that the legislature "reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability . . . ." 476 So.2d 659. That finding satisfies the rationality test and disposes of appellant's assertion that there is a substantial federal question here.

Appellant's reliance on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), is inapposite. In *Chevron*, plaintiff was injured while working on an offshore drilling rig, and brought suit against his employer more than one year later. At the time, admiralty law governed his suit.

While the suit was pending, the Supreme Court decided *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969), which overruled prior federal law and held that state law, not admiralty law, governed suits such as plaintiff's. The applicable state law contained a one year statute of limitations; admiralty law embraced the doctrine of laches, and had no statute of limitations. The issue in *Chevron* was whether the state statute of limitations should be retroactively applied to bar plaintiff's suit.

Chevron did not, as appellant implies, find that plaintiff's pending cause of action was an absolute property right which could not be retroactively abolished by the new statute of limitations. Rather than looking to the due process clause, the *Chevron* Court relied on a three part balancing test, weighing competing policy considerations.

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation . . . Finally, we have weighed the inequity imposed by retroactive application . . . ."

404 U.S. at 106-07.

The two Florida federal district courts addressing the due process issue appellant raises, and applying the *Chevron* test to facts analogous to those here, have concluded that retroactive application of *Pullum* is appropriate and constitutionally permissible. *See Lamb v. Volkswagenwerk Aktiengesellschaft,* 631 F.Supp. 1144, 1150-51 (S.D.Fla. 1986); *Eddings v. Volkswagenwerk, A.G.*, 635 F.Supp. 45, 47-48 (N.D.Fla. 1986). Significantly, *Lamb* and *Eddings* both ruled that the *Chevron* test only applies to the retroactivity of a federal decision involving federal law, and not to the retroactivity of a state decision involving state law. The latter issue, both courts agreed, is purely one of state law and does not raise a substantial federal question. *See Lamb* 631 F.Supp. at 1151-52; *Eddings*, 635 F.Supp. at 48.[6]

Moreover, the *Chevron* test has been used retroactively to apply a new statute of limitations and dismiss pending claims. In *DelCostello v. International Brotherhood of*

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6. As additional support for its conclusion that retroactive application of *Pullum* does not raise due process issues, the *Lamb* court cited to the several cases where this Court has "dismissed, for want of a federal question, several appeals of state court decisions upholding statutes of repose." 631 F.Supp. at 1151.

Teamsters, 462 U.S. 151 (1983), this Court overruled prior precedent and held that a six month statute of limitations governed certain actions by employees under Section 301 of the Labor Management Relations Act of 1947. Using the *Chevron* test, *DelCostello* was applied retroactively to bar pending claims in *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, 469 U.S. 916 (1984), and *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983). Similarly, retroactive application of *Pullum* to bar appellant's cause of action does not offend the due process clause.

II. APPELLANT FAILED TO RAISE BELOW, AND THUS DID NOT PRESERVE, ANY FEDERAL QUESTION.

Not only should this appeal be dismissed for its failure to present a substantial federal question, but it should also be dismissed because appellant did not raise his federal due process argument before the Supreme Court of Florida, nor did that court rule on the issue.

This Court will not consider federal questions not presented and decided by the state's highest court below:

> In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons

> that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940). *See also, Heath v. Alabama*, 474 U.S. 82, 87 (1985) ("Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, . . . the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review."). Here, appellant's due process claims were neither pressed nor passed upon in the Supreme Court of Florida.

In order to press a federal question in a state's highest court, a party must "adequately" and "squarely" present that issue. *Board of Directors of Rotary International v. Rotary Club of Duarte*, ____ U.S. ____, 107 S.Ct. 1940, 1948 (1985). A "casual reference" to a federal question "is insufficient to inform a state court that it has been presented with a claim subject to" this Court's appellate jurisdiction. 107 S.Ct. at 1948 n.9.

Appellant never pressed a federal question in the Supreme Court of Florida. Although appellant's brief contained several references to "property rights" and "due process," no attempt was made to differentiate between the Florida or United States Constitutions.[7] Moreover, the brief does not mention, quote, or cite to Article XIV of the United States Constitution.

The only place appellant can arguably claim to have hinted at a federal issue is on page 13 of his brief, where he

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7. Article 1, Section 9 of the Florida Constitution contains a due process clause providing, in relevant part:

> No person shall be deprived of life liberty, or property without due process of law. . . .

argued, almost as an afterthought, that "[r]etroactive application of *Pullum* would also impair federal due process rights." He then cites *Chevron*, 404 U.S. 97, not a constitutional case, and *Logan*, 455 U.S. 422, which held that a common law cause of action could be abolished by the state. This cursory allusion to federal due process did not "adequately" and "squarely" present the federal due process issue before the Supreme Court of Florida, and amounts to nothing more than the "casual reference" to a federal question this Court has determined is insufficient to invoke its appellate jurisdiction. *Board of Directors of Rotary International v. Rotary Club of Duarte, supra*, 107 S.Ct. at 1948.

Appellant is in the same position as the unsuccessful petitioner in *Webb v. Webb*, 451 U.S. 493 (1981). There, petitioner obtained a Florida judgment awarding her custody of her child. Thereafter, the Georgia Supreme Court awarded custody to the child's father. Petitioner appealed to this Court, arguing that Georgia's refusal to abide by the prior Florida judgment violated the full faith and credit clause of Article XIV, Section 1 of the United States Constitution.

This Court held that the petitioner's general references to "the full faith and credit" clause were insufficient to apprise the state courts that she was raising a federal constitutional issue.

> Although petitioner did use the phrase "full faith and credit" at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution . . . .
>
> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole

> shows either expressly or by clear implication, that the federal claim was adequately presented in the state system.

451 U.S. at 496-97. This Court found, from the record, that it was unclear whether the petitioner's use of "full faith and credit" was a reference to the United States Constitution, or to a uniform child custody act adopted by Florida and Georgia pursuant to which, arguably, Georgia should have recognized the Florida judgment; Georgia's constitution does not contain a full faith and credit clause.

Appellant must also show that the Florida Supreme Court passed upon the federal due process issue. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. at 434; *Heath v. Alabama*, 474 U.S. at 87. It did not.

In *Brackenridge v. Ametek, Inc.*, 517 So.2d 667 (Fla. 1987), the Supreme Court of Florida decided the two issues certified to it by the Third District Court of Appeal:

> I. Should the Legislative Amendment of Section 95.031(2), Florida Statutes (1983), abolishing the statute of repose in product liability actions, be construed to operate retrospectively as to a cause of action which accrued before the effective date of the amendment?
>
> II. If not, should the decision of *Pullum* . . . apply so as to bar a cause of action that accrued after the *Battilla* decision but before the *Pullum* decision?

517 So.2d at 668.

In deciding these two state law issues, the Supreme Court of Florida rejected appellant's contention that his pending cause of action was a property right. In so doing, the court only cited to Florida cases involving state law and

did not mention due process or the United States Constitution. 517 So.2d at 668-69.[8]

Because the Florida Supreme Court did not pass upon appellant's federal due process claim, he cannot raise it here.

> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Webb v. Webb, 451 U.S. at 495.

The Supreme Court of Florida did not pass upon any federal question in *Brackenridge*. Appellant's attempt to raise such a question before this Court should be rejected.

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8. By contrast, in *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987), decided the same day as *Brackenridge* and involving similar material facts, the Supreme Court of Florida addressed three questions certified to it by the Third District Court of Appeal. The first two of those questions were identical to those in *Brackenridge*. However, the third certified question explicitly involved the due process clause of the United States Constitution:

> III. Would the application of *Pullum*, to bar a cause of action that accrued after the *Battilla* decision but before the *Pullum* decision, deprive the plaintiff of a right of due process guaranteed by the United States Constitution?

515 So.2d at 1275. This federal constitutional issue was directly addressed and answered in the negative in *Clausell* by the Florida Supreme Court, which cited decisions by this Court and other federal courts holding that a cause of action is not a property right. 515 So.2d at 1275-76.

CONCLUSION

A cause of action is not a vested property right; therefore, appellant does not raise a substantial federal question. Additionally, no federal question was pressed by appellant or passed upon by the Supreme Court of Florida. This appeal should be dismissed.

May 27, 1988

Respectfully submitted,

David C. Pollack
Ricardo Torres, Jr.
Attorneys for Appellee,
Ametek, Inc.
Stroock & Stroock & Lavan
3300 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2385
(305) 358-9900

CERTIFICATE OF SERVICE

I certify that a copy of Ametek's Motion to Dismiss Appeal was mailed on May 27, 1988 to: George C. Vogelsang, Esq., The Vogelsang Law Firm, Attorneys for Brackenridge, 6701 Sunset Drive, Suite 102A, Miami, Florida 33143; Linda Koenigsberg, Fsq., Law Offices of James O. Nelson, Attorneys for Baring, One Biscayne Tower, Suite 2628, Two South Biscayne Boulevard; Miami, Florida 33131; and William G. Liston, Esq., Stephen R. Berger, P.A., Attorneys for Baring, 8525 S.W. 92 Street, Suite B-5, Miami, Florida 33156.

Ricardo Torres, Jr.